



February 2, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc., Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

**RE: WT Docket No. 05-194
Petition of the Cellular Telecommunications & Internet Association
for an Expedited Declaratory Ruling**

**WT Docket No. 05-193
Petition for Declaratory Ruling filed by SunCom Operating Company
L.L.C. and Opposition and Cross-Petition for Declaratory Ruling Filed
by Debra Edwards**

Dear Ms. Dortch:

Please find attached an *ex parte* presentation, on behalf of AARP, in the above referenced dockets.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Certner
Director, Federal Affairs

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition of the Cellular)	
Telecommunications & Internet)	WT Docket No. 05-194
Association for an Expedited)	
Declaratory Ruling)	
)	
Petition for Declaratory Ruling filed)	
by SunCom Operating)	WT Docket No. 05-193
Company L.L.C. and Opposition)	
and Cross-Petition for Declaratory)	
Ruling Filed by Debra Edwards)	

EX PARTE OF AARP

David Certner
Director, Federal Affairs

AARP
601 E Street NW
Washington, DC 20049

February 2, 2006

SUMMARY

The record in this proceeding is sharply divided regarding the proper allocation of regulatory authority over wireless early termination fees (“ETFs”) under § 332(c)(3) of the Communications Act. The CMRS providers and their trade association, on the one hand, advocate an absolute rule whereby any aspect of the carrier-customer relationship with which a dollar figure can be associated—including ETFs—is a “rate,” and therefore subject exclusively to federal regulatory authority. Because such an interpretation is inconsistent with the plain language of § 332(c)(3), which reserves to the states jurisdiction over “other terms and conditions” of CMRS contracts, and inconsistent with the traditional power of states to regulate commercial activities within their borders, the Commission cannot adopt it.

Consumer advocates (including AARP) and state regulators, on the other hand, recognizing that states have no authority over the rates CMRS providers charge for their wireless service, advocate a more balanced, nuanced approach to compliance with § 332(c)(3). As to “other terms and conditions,” state jurisdiction and the neutral application of state consumer protection and contract law continue. Under this interpretation of § 332(c)(3), states have the jurisdiction to reject ETFs that constitute impermissible penalties under state contract law. Because this interpretation is consistent with the plain meaning of this statutory section and our federalist system of government, the Commission should endorse it.

The Commission must also deny the declaratory relief requested by CTIA because the record in this proceeding does not satisfy the standard for declaratory rulings: material facts are still in dispute in this proceeding. Specifically, the CMRS providers' claim that ETFs recover the cost of providing service and therefore are "rates" within the meaning of § 332(c)(3) is unsupported and vigorously disputed by the non-carrier commenters. Moreover, the CMRS providers have failed to provide sufficient information to grant their petition since they have not even identified the particular ETFs and/or carriers to whom the declaratory ruling would apply. The Commission cannot render an industry-wide declaratory ruling regarding ETF practices that have not been identified and that vary from carrier to carrier.

Moreover, CTIA has further failed to provide any legal basis for the Commission to excuse the CMRS industry from the neutral application of state consumer protection and contract law, which apply to every other "deregulated" industry in the United States. Contrary to CTIA's claim, a consumer's ability to challenge CMRS provider's practices under § 201(b) is not an adequate alternative to the full panoply of state contract and consumer protection remedies.

Because a "rate" must be a charge for communications service, and ETFs are not charges for service, there is also no merit to CTIA's contention that ETFs are "rates" within the meaning of § 332(c)(3). Neither the latest *Truth-in-Billing Order* nor the cases cited by the carriers in this proceeding expand the definition of "rate" to make it encompass ETFs.

In fact, ETFs logically fall within the meaning of “other terms and conditions” over which states have jurisdiction. In particular, the legislative history of § 332(c)(3) indicates that regulations related to service and equipment bundling were reserved to the states, and the providers’ comments indicate that one of the putative purposes of ETFs is to subsidize handset costs. Further, the carriers themselves style ETFs as contractual liquidated damages provisions (*i.e.*, a contractual term and condition) and rely on state contract law to enforce ETFs against their customers. Under such circumstances, customers must have symmetric access to the requirements of state contract law and consumer protection defenses.

The CMRS providers are also mistaken in their contentions that state regulation of ETFs is “conflict preempted” or will somehow “Balkanize” the CMRS industry. The carriers also misapprehend the applicability of the “complete preemption” doctrine to this proceeding. Section 332(c)(3) explicitly confers jurisdiction over CMRS “rates” to the federal government and jurisdiction over “other terms and conditions” of CMRS contracts to the states. Because ETFs are “other terms and conditions,” no exercise of state authority over ETFs could conflict with a properly promulgated federal policy. Pursuant to § 332(c)(3), state authority over ETFs *is* federal policy. Against this statutory background, the CMRS industry cannot justify preemption of the states’ traditional power to regulate commercial activities within their borders. Moreover, empirical evidence indicates that state-by-state regulation of ETFs has not upset the ability of carriers to offer nationwide service plans.

Finally, contrary to the carriers' claims, consumers are deeply dissatisfied by ETFs and do not view them as rates. Not only have all of the nation's top consumer organizations weighed in against the relief sought by CTIA in this proceeding, but the FCC data regarding informal consumer complaints and numerous press accounts all indicate significant consumer dissatisfaction with these conditions of service. This consumer unrest has been clearly documented in a U.S. PIRG Report that is part of the record in this proceeding.

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EX PARTE OF AARP

AARP¹ hereby submits this *ex parte* filing in response to the Commission's May 18, 2005 *Public Notices*² ("*CTIA and SunCom-Edwards Public Notices*") and the comments and reply comments filed in the above-captioned proceeding.

For the reasons described in greater detail below, the Commission cannot grant CTIA's Petition because the petition is premised upon the existence of material facts which are disputed on the record developed in this docket. The

¹ AARP is a nonprofit, nonpartisan membership organization that helps people 50+ years in age have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP has staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

² *Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling*, WT Docket No. 05-194, Public Notice, DA 05-1389 (May 18, 2005) ("*CTIA Public Notice*"), 70 Fed. Reg. 38928 (July 6, 2005); *Petition For Declaratory Ruling Filed By SunCom, And Opposition And Cross-Petition For Declaratory Ruling Filed By Debra Edwards*, WT Docket No. 05-193, Public Notice, DA 05-1390 (May 18, 2005) ("*SunCom-Edwards Public Notice*"), 70 Fed. Reg. 38926 (July 6, 2005).

Commission must therefore deny or dismiss the Petition. To the extent that the facts are undisputed, they demonstrate that early termination fees (“ETFs”) in cellular contracts constitute “other terms and conditions” within the meaning of § 332(c)(3) of the Communications Act of 1934, as amended (“Communications Act”).³ Accordingly, the only declaration supported by this record would be that ETFs are subject to state jurisdiction as terms and conditions of commercial contracts.

I. INTRODUCTION

In its comments, AARP outlined the division of authority between the FCC and the states under § 332(c)(3).

First, AARP agreed with CTIA that § 332(c)(3) expresses a general Congressional policy in favor of allowing marketplace forces to govern the provision of commercial mobile radio service (“CMRS”), which the Commission has implemented in its rules and policies. But those marketplace forces include the body of contract law and consumer protection law applicable to commercial transactions. The Commission’s deregulatory policy for CMRS providers is not a license for CMRS providers to operate outside the boundaries of commercial law, as CTIA’s Petition suggests. CTIA’s Petition effectively seeks to equate FCC deregulation with freedom from the basic legal requirements applicable to any commercial activity in a state, a status that no business in America can have.

³ 47 U.S.C. § 151, *et seq.* Unless otherwise noted, all section references are to the Communications Act.

Second, AARP pointed out that the gravamen of CTIA's case—that ETFs constitute “rates” within the meaning of § 332(c)(3)—is refuted by the fact that an ETF is not a charge for the provision of commercial mobile services. In fact, it is quite the opposite; it is a charge that applies when service is *not* provided. Because ETFs are penalty charges designed to compel consumer behavior, long-settled state contract law principles classify them as “terms and conditions,” a conclusion that is confirmed by decisions of both the FCC and the courts. The CTIA Petition ignores those decisions and relies instead upon decisions that are inapposite, such as those based on the holding of *Central Office Telephone*⁴ that all tariffed terms are “rate affecting,” or that are of dubious precedential value, such as *Ryder*'s⁵ analysis of ETFs for tariffed landline services under § 201(b).

Third, AARP observed that, regardless of the Petition's substantive legal merits (or lack thereof), the CTIA Petition is procedurally defective because it seeks a declaratory ruling premised on material facts that are in dispute. Under the Commission's precedent for acting on declaratory ruling petitions, the Petition must therefore be denied.

Finally, AARP challenged CTIA's claims that ETFs do not concern consumers. In fact, the number of consumer complaints regarding ETFs continues to increase and indicates extensive customer unrest over these unlawful penalties.

Not surprisingly, the record in this proceeding is sharply divided between CMRS providers on one side, and consumer groups and state regulators on the

⁴ *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998).

⁵ *Ryder Communications, Inc. v. AT&T Corp.*, File No. EB-02-MD-038 (rel. July 7, 2003).

other. The CMRS industry advocates an interpretation of § 332(c)(3) that would effectively read the phrase “terms and conditions” out of existence and strip states of their well-established power to regulate commercial activities within their borders. Under the interpretation of the Communications Act supported by CMRS providers, states have no power to regulate any element of the carrier-customer relationship so long as a dollar amount can be associated with it, regardless of whether that amount is, in fact, a “rate” charged for CMRS service.

Consumer advocates and state regulators, on the other hand, offer a more nuanced interpretation of the statute that comports with the intent of Congress. While states may not regulate the rates CMRS providers charge for the provision of service, states continue to exercise their traditional jurisdiction over commercial matters within their borders, including the lawfulness of a CMRS provider’s “other terms and conditions” of service. ETFs supposedly compensate CMRS providers when a customer terminates a service contract before expiration of its term. Therefore, ETFs are either permissible liquidated damages provisions or impermissible contractual penalties.⁶ Like every other business in America, CMRS providers can only seek state enforcement of terms and conditions that comply with a state’s contract and consumer protection law.

In the context of an unregulated marketplace that is governed only by the constraints of commercial law, the comments and reply comments filed by

⁶ Although the law of contracts is founded upon the enforcement of negotiated agreements, the right to enforce agreed-upon terms is not unlimited. Usurious contracts, contracts with minors, and contracts to perform illegal acts, for example, will not be enforced. Of specific interest in this case is the well-established and long-standing principle that, although damages for breach may be agreed upon by the parties in a contract, penalties are unenforceable. Restatement (Second) of Contracts § 356(1) (1981).

consumer advocates and state regulators offer a more reasonable interpretation of § 332(c)(3), as described in greater detail below.

II. THE COMMISSION CANNOT GRANT DECLARATORY RELIEF BECAUSE MATERIAL FACTS ARE IN DISPUTE

A. Declaratory Relief Requires Undisputed Material Facts

The decision to issue a declaratory ruling is a matter committed to the Commission's "sound discretion"⁷ under the Administrative Procedure Act and the Commission's rules.⁸ The Commission will use a declaratory ruling to resolve a controversy if the facts are "clearly developed" and "essentially undisputed."⁹ "The petitioner in such a proceeding must provide sufficient information to enable the Commission to resolve the controversy in a meaningful manner."¹⁰ When the relevant facts are in dispute or not clearly developed, declaratory relief is "inappropriate"¹¹ and the Commission will decline to issue a declaratory ruling.¹²

⁷ *Cascade Utilities, Inc., American Telephone and Telegraph Company, Petition for Declaratory Ruling*, Memorandum Opinion and Order, 8 FCC Rcd 781, 782, ¶ 11 and n.7 (CCB 1993).

⁸ *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff FCC No. 2*, FCC 03-244, 30 C.R. 1071, ¶ 20 (2003) ("*Joint Traffic Assignment Petition*") (citation omitted).

⁹ *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, 4 FCC Rcd 550, ¶ 18 (CCB 1989) ("*AmNet Backbilling Petition*").

¹⁰ *Id.*

¹¹ *Joint Traffic Assignment Petition*, ¶ 18 and n.87.

¹² See, e.g., *Joint Traffic Assignment Petition*, note 8, *supra*; *AmNet Backbilling Petition*, note 9, *supra*; *Aeronautical Radio, Inc.*, 5 FCC Rcd 2516 (CCB 1990) ("*ARINC Double Billing Petition*").

B. The Underlying Facts Governing The Proper Classification Of ETFs Under § 332 Are In Dispute

In its Opening Comments, AARP disputed CTIA's factual claims and urged the Commission to reject the CTIA Petition as procedurally defective because it improperly seeks a declaratory ruling based on a disputed factual record. Since the filing of AARP's comments, CTIA has failed to supplement the record with any evidence to support the factual claims in its Petition and Reply Comments. The Commission must therefore conclude that material facts are in dispute, making a declaratory ruling impossible.

In its Petition and its Reply Comments, CTIA argues that ETFs recover carriers' costs of service—and therefore are “rates” for purposes of § 332—because CTIA says they do. CTIA's support for its claim is only a series of bald assertions that ETFs are “an integral part of the overall rate level and rate structure”¹³ in term contracts. According to CTIA, ETFs are rates because they are “necessary to recover costs incurred by the carrier in initiating and providing wireless service, including handset subsidies, costs of customer acquisition and service initiation, and the offer of lower monthly rates under term service agreements.”¹⁴ CTIA further asserts that ETFs are “part of the consideration paid by the subscriber in exchange for lower up-front payments and lower monthly rates;”¹⁵ and are a rate element that is “interdependent with other rate elements and forms an overall rate structure.”¹⁶

¹³ CTIA Reply at i.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

CTIA argues that courts lack any authority when it comes to determining the legality and/or propriety of these purported “rates.”¹⁷ Therefore, posits CTIA, when a court engages in assessing the legality of a particular ETF (*i.e.*, whether the ETF is a penalty) the court is engaged in impermissible rate-making. Under CTIA’s approach, a penalty provision which contains a dollar amount becomes a “rate” that courts cannot review. And if state contract law requires an evaluation of the legality of a contract provision (because contract law permits liquidated damages provisions but not penalties)¹⁸ courts cannot perform that assessment because doing so would constitute “ratemaking.”

But CTIA’s lengthy discussion begs the question. Courts are not involved in “ratemaking” when they review the lawfulness of an ETF unless the ETF is a “rate.” To say that § 332 prohibits courts from determining the legality of an ETF because courts have no jurisdiction over “rates” impermissibly presupposes that ETFs *are* rates.

That question is a factual question. If ETFs are just one element in a set of rate elements that, taken together, recover the carriers’ costs of providing wireless service, then, according to CTIA, ETFs may constitute a “rate” under § 332(c)(3). But if, as a factual matter, an ETF is *not* simply another rate element (*i.e.*, if a wireless service provider establishes ETFs to compel consumer behavior that benefits the carrier, such as discouraging customers from switching to competitors who offer better prices or better service) then the ETF, as a matter of *fact*, is *not* a “rate” within the meaning of § 332. Instead, it is a penalty

¹⁷ CTIA Petition at 22-28; CTIA Reply at 18-26.

¹⁸ See note 6, *supra*.

imposed as a term or condition of service in order to compel customer loyalty or reduce customer “churn” which the carrier has otherwise failed to earn on the basis of competitive pricing or service quality.

The Commission should reject the carriers’ simplistic syllogism that a charge which produces a revenue stream for the carrier constitutes a “rate,” with no further factual inquiry required. If one follows the wireless commenters’ analysis to its logical end, then every contract clause with which a dollar amount is associated—limitations on liability, for example, or security deposits triggered by late payment during the contract’s term—are “rates” because they have the potential to fill the carriers’ coffers.

In the instant proceeding, whether ETFs are “rates” or whether ETFs are penalties established to prevent consumers from reacting to marketplace competition is a material fact which has not been developed by the Petitioner and which is in dispute on the record in this docket.

Thus, contrary to CTIA’s overbroad assertions purporting to characterize carrier practices on an industry-wide basis, the record in this proceeding fails to demonstrate that ETFs are invariably “rates.” that merely contribute to a carrier’s cost recovery. They are just as likely to be penalty provisions which are impermissible under well-settled principles of contract law, and which the Commission must allow state courts to evaluate, like any other term or condition of service, pursuant to the standards of state contract law.

At a minimum, the record indicates that practices may vary from carrier to carrier, making it impossible for the Commission to grant CTIA’s Petition and

make an industry-wide declaration that would accurately reflect the factual circumstances of every wireless provider, or even every CTIA member. For example, the ETFs of Verizon Wireless, T-Mobile, and Nextel do not decrease in amount regardless of when a customer terminates her contract.¹⁹ Dobson Communications, on the other hand, has an ETF that “decreases during the term of the contract.”²⁰ In the face of such variation among CMRS providers, the Commission cannot grant CTIA the industry-wide declaration it seeks.²¹

C. Because CTIA Has Not Met Its Evidentiary Burden, the Commission Must Deny the Petition

CTIA has failed to: (1) specify the ETFs to which the declaration sought by CTIA would apply; (2) identify the specific wireless carriers to whom the declaration CTIA seeks would apply; and (3) supply any empirical data which would allow the Commission to characterize a particular ETF as a “rate” for service provided, rather than a penalty charge or other term and condition of service.

Indeed, since ETFs typically apply when service is *not* provided, and regardless of the amount of service a customer has already received or will forego in the future, it is difficult for a particular carrier that collects those charges, much less an industry-wide organization like CTIA, to demonstrate that

¹⁹ AARP Comments, Ex. 1 (Verizon Wireless contract at 1); (T-Mobile contract at 1); (Nextel contract at 1).

²⁰ Dobson Communications Corp. Comments at 3 n.6.

²¹ *ARINC Double Billing Petition*, ¶ 19 (“in the absence of more detailed *information regarding the means by which LECs deliver...the services* identified by ARINC and, indeed, *in the absence of an identification of particular LECs* from whom we could obtain such information, we cannot issue the declaratory ruling requested by ARINC”) (emphasis added).

ETFs are rates. Similarly, CTIA's contention that ETFs merely recover costs that would otherwise go unrecovered is belied by the fact that the carriers generally set their ETFs as flat fees that do not shrink as the remaining term of the service contract contracts. If ETFs were related to cost recovery, the applicable ETF should diminish over the term of the contract to reflect that the customer's cumulative rate payments "draw down" any front-loaded costs that are supposedly spread over the life of a term contract and justify the imposition of an ETF.

The Commission has been presented with similar factual claims in the past and has properly declined to grant declaratory relief. In the *ARINC Double Billing Petition Order*, for example, ARINC sought a declaration regarding the Part 69 access charges that should apply to a particular service configuration (when "spillover" traffic from a LEC-provided FX hunt group was forwarded to an IXC for termination to the same customer location via the IXC's toll-free service).

Southwestern Bell argued that the Commission lacked sufficient information to grant the petition because ARINC failed to: (1) identify the specific local carriers involved in the disputed practice; (2) specify the extent or amount of overbilling ARINC was experiencing; (3) identify the specific geographic areas in which overbilling had occurred; and (4) specify the extent of the problem by geographic region.²² The Commission agreed, stating that the dispute "appears to stem not from differing interpretations of the Commission's Rules, but from differing views of how various LECs provide the [toll-free] portion of a call

²² *Id.*, ¶ 12.

completed over [IXC] facilities.”²³ The Commission held that, “in the absence of more detailed *information regarding the means by which LECs deliver...the services* identified by ARINC and, indeed, *in the absence of an identification of particular LECs* from whom we could obtain such information, we cannot issue the declaratory ruling requested by ARINC.”²⁴

Similarly, in the instant proceeding, the opposing parties do not have differing interpretations of the applicable statutory provision but rather differing views of how particular ETFs must be classified under the statute, *i.e.*, whether particular ETFs constitute “rates” rather than “terms and conditions.”

As the petitioner in this proceeding, CTIA has the burden of providing “sufficient information to enable the Commission to resolve the controversy in a meaningful manner.”²⁵ Because CTIA’s Petition does not provide “more detailed information” regarding the relationship of particular ETFs to individual carriers’ rates and, indeed, fails even to identify the particular CMRS providers who could supply that information, the Commission cannot issue the declaratory ruling CTIA seeks.

III. SECTION 332(c)(3) DOES NOT EXEMPT THE WIRELESS INDUSTRY FROM STANDARD COMMERCIAL LAW

A. “Deregulated” Carriers Must Still Abide By State Commercial Law

The interpretation of § 332 advocated by CTIA and its supporters would leverage the deregulatory policies of the Communications Act into a unique

²³ *Id.*, ¶ 18.

²⁴ *Id.*, ¶ 19 (emphasis added).

²⁵ *AmNet Backbilling Petition*, ¶ 18.

status for CMRS providers: commercial enterprises that are exempt from both regulatory and common law standards. Specifically, the wireless industry is arguing in effect that a “deregulated” wireless marketplace is one in which no contract law and no consumer protection law applies. The Commission, like the California Court of Appeals, should reject the carriers’ argument as inconsistent with the Congressional intent underlying § 332(c)(3): “[T]he availability of state law remedies is consistent with the 1993 amendments’ objective to achieve maximum benefits for consumers and providers through reliance on the competitive marketplace, in which state law duties and remedies ordinarily are enforceable.”²⁶ Freedom from rate regulation is not a license to operate outside the law.

B. Challenging A Practice As Unreasonable Under § 201 Is Not A Substitute For Challenging the Practice Under State Law

Consistent with its effort to avoid the application of state commercial law—to which every other American business is subject—CTIA and its supporters²⁷ posit that the ability to challenge a rate or practice as “unreasonable” under § 201(b) in federal court or before the FCC in a complaint proceeding,²⁸ is an adequate substitute for recourse in state or federal court on a state law theory of damages.

Preliminarily, the Commission should regard this argument with some skepticism, given that the CMRS industry has already asked the FCC to forbear

²⁶ *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 1376-77 (2001).

²⁷ Verizon Comments at 24; Cingular Reply at 30-34.

²⁸ See § 207.

from enforcing § 201(b) on at least one occasion,²⁹ casting significant doubt on the CMRS industry's commitment to the FCC's complaint process. Assuming *arguendo* that CMRS providers will continue to be subject to the FCC's § 201(b) jurisdiction, a § 201(b) complaint still is not an adequate substitute for state contract law remedies, from a customer's perspective, for several reasons. First, such complaints cannot address carrier practices that fall outside the scope of § 201(b) but still violate state law. Moreover, a single federal agency headquartered in Washington is no substitute for the resources and geographical convenience of local courts and utility regulators in every state. The CMRS providers' real, but unstated, objection is to § 332(c)(3) itself, which gives the states jurisdiction over the "terms and conditions" of CMRS contracts, and the Constitution, which establishes a federalist republic under which the states have substantial responsibility for commercial activities within their borders.

IV. ETFS ARE NOT "RATES CHARGED" WITHIN THE MEANING OF § 332(c)(3)

A. "Rates" Must Have Services Associated With Them

As demonstrated in AARP's Comments and seconded by the consumer advocates and state regulators, a "rate" must be associated with a communications **service**.³⁰ Specifically, "[a] 'rate' means 'the price of a

²⁹ See *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 20 (1998) ("PCIA argues that competition in the marketplace can appropriately regulate the provision of wireless telecommunications services by broadband PCS providers and that the present level of competition can supplant sections 201 and 202").

³⁰ Consumer Groups Comments at 6.

particular service or piece of equipment from a telephone company.”³¹ Thus, ETFs are not “rates” when the consumer gets **no service** in return for remitting an ETF, in contrast to charges for, among other things, “ringtones [and] overages.”³²

CTIA misapprehends the preemptive reach of the *Southwestern Bell* and *Wireless Consumers Alliance* decisions by relying on the holding that state courts cannot “make an outright determination of whether a price charged for a CMRS service was unreasonable.”³³ In the instant case, ETFs are not “price[s] charged for a CMRS service.” They are, as noted in AARP’s Comments, either illegal liquidated damages provisions or unenforceable penalties. The holdings from the *Southwestern Bell* and *Wireless Consumers Alliance* cases are simply irrelevant to the issues in CTIA’s petition.

B. Neither the Latest Truth-In-Billing Order Nor the Cases Cited By the Carriers Indicate That ETFs Are “Rates”

Contrary to the allegations of the wireless carriers, the Commission’s latest Truth-in-Billing Order does not mandate that ETFs be classified as “rates.”³⁴ The order, by its terms, merely regulates what states can order carriers

³¹ NASCUA Reply at 5-6 (citing *Harry Newton, Newton’s Telecom Dictionary* 701 (16th ed. 2000)).

³² Consumer Groups Comments at 10. See also WCA Comments at 8 (“A customer does not get any services by paying an early termination fee. Instead of being a charge for service, an ETF is a charge for the *discontinuation* of service....”)

³³ CTIA Reply at 21 (citing *Southwestern Bell Petition*, 14 FCC Rcd 19898, ¶ 7 (1999); *Wireless Consumers Alliance Petition*, 15 FCC Rcd 17021, ¶ 25 (2000)).

³⁴ Cingular Reply at 19.

to establish as charges for service via line items on bills.³⁵ As the order itself stated in the very passage quoted by CTIA in its Reply,

State regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates.³⁶

A state court applying principles of contract law to invalidate an ETF designed to compel consumer behavior (*i.e.*, an impermissible penalty) rather than as a permissible liquidated damages clause *does not* dictate how a carrier recovers its costs. By definition, the court can invalidate only a penalty provision that serves to coerce consumer behavior.³⁷ As the Commission emphasized in the Truth-In-Billing Order, “not all regulation relating to a carrier’s bills and its relationship with customers represents preempted ‘rate regulation.’ For example, ... the neutral application of state contractual or consumer fraud laws, are not preempted by section 332.”³⁸

The cases addressing landline, tariffed service, such as *MCI Telecommunications Corp. v. FCC*,³⁹ also have no bearing on whether a particular contractual term, such as an ETF, is a “rate” within the meaning of

³⁵ *Truth-in-Billing and Billing Format, NASCUA Petition for Declaratory Ruling Regarding Truth-in-Billing*, FCC 05-55 (Second Report and Order and Declaratory Ruling), ¶ 30 (March 18, 2005) (“*Truth-in-Billing Order*”).

³⁶ *Id.*, ¶ 31, (cited by CTIA in its Reply at 14).

³⁷ See, e.g., *Ridgley v. Topa Thrift & Loan Ass’n*, 953 P.2d 484, 488 (Cal. 1998) (“A penalty provision **operates to compel performance of an act** and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach”) (emphasis added, citations omitted); *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1160 (7th Cir. 1997) (“Illinois like **all other states** does not enforce penalty clauses in contracts”) (emphasis added).

³⁸ *Truth-in-Billing Order* at ¶ 33.

³⁹ 822 F.2d 80 (D.C. Cir. 1987).

§ 332(c)(3).⁴⁰ In *MCI Telecommunications*, the D.C. Circuit was called upon to determine whether certain cancellation and discontinuation charges for private line services were “rates” within the meaning of a *Settlement Agreement* pursuant to which AT&T provided interconnection services to its competitors. The Court found that these charges were “rates” because they were “a charge to a customer to receive service.”⁴¹

In the instant case, however, the issue is whether ETFs are “rates” within the meaning of § 332(c)(3), not a settlement agreement. As described in this pleading, because customers receive no service in return for paying these amounts, ETFs are not “rates.” Moreover, the CMRS providers themselves have offered no evidence that their ETFs are rates. In fact, Cingular has flatly refused to do so, stating that such a “full-blown rate case ... would be inappropriate for a CMRS carrier.”⁴²

Finally, the Eighth Circuit’s recent decision in *Cellco Partnership v. Hatch*,⁴³ does not, as argued by CTIA in its *ex parte* filing,⁴⁴ support federal preemption in the instant case. In particular, in *Cellco Partnership*, the court preempted a state statute that required CMRS carriers to provide their customers with 60 days notice of any proposed rate increases and then have the customer accept the rate increase (“opt-in”) prior to the increase becoming effective.⁴⁵ As

⁴⁰ CTIA Reply at 8; SunCom Reply at 8.

⁴¹ *MCI Telecomms.*, 822 F.2d at 86 (quoting Black’s Law Dictionary 1134 (5th ed. 1979)).

⁴² Cingular Reply at 26. See also NASUCA Reply at 14 (distinguishing *MCI Telecomms.*).

⁴³ No. 04-3198, 2005 U.S. App. LEXIS 26887 (8th Cir. Dec. 9, 2005).

⁴⁴ *Ex Parte* Letter of CTIA, WT Docket Nos. 05-194, 05-193 (filed Dec. 21, 2005).

⁴⁵ *Cellco Partnership*, at *12.

described by the Eighth Circuit, “The 60-day notification period ... *effectively freezes rates for 60 days* when the provider notifies a customer of a proposed change in rates.”⁴⁶ This state statute therefore “effectively regulates rates, and is preempted by § 332(c)(3)(A).”⁴⁷

By contrast, subjecting ETFs to the neutral application of state consumer protection and contract law—as proposed by AARP and the other non-carrier commenters in this proceeding—is not rate regulation, and is unaffected by the *Cellco Partnership* decision. First, while the “increase[s] in the charge,”⁴⁸ at issue in *Cellco Partnership* are clearly “rates,” within the meaning of § 332(c)(3), ETFs, for all the reasons described by the non-carrier commenters in this docket, are “other terms and conditions.” Thus, ETFs are subject to state jurisdiction.

Second, as pointed out by the Wireless Consumers Alliance,⁴⁹ the statute at issue in *Cellco Partnership* was not a contractual or consumer protection law of “general applicability,” but rather singled out the CMRS industry for discriminatory treatment. Therefore, this state law is subject to particularly close scrutiny under the preemptive provisions of § 332(c)(3). On the other hand, the state consumer protection and contract law that CTIA seeks to preempt in this proceeding is commercial law that applies to all businesses. As such, CTIA is asking the Commission to preempt state regulation of “other terms and

⁴⁶ *Id.* at *13 (emphasis added).

⁴⁷ *Id.* at *17.

⁴⁸ *Id.* at *12.

⁴⁹ See *Ex Parte* Letter of Wireless Consumers Alliance, WT Docket Nos. 05-194, 05-193 at 3 (filed Jan. 11, 2006) (citing FCC *Amicus Curiae* Brief in *Cellco Partnership*).

conditions” of CMRS contracts, a request that conflicts with the plain language of § 332(c)(3), and must be denied.

C. AARP Has Not Conceded That ETFs Are “Rates”

Finally, by sponsoring certain cellular plans with ETFs, AARP has not, as alleged by Verizon Wireless, somehow conceded that ETFs are “rates.”⁵⁰

Consistent with its position in this proceeding, AARP attempted to negotiate away these ETFs in its negotiations with the underlying carriers. The underlying carriers insisted on including these fees. Therefore, AARP’s position in its negotiations with the carriers is consistent with its position in this proceeding—ETFs are anti-consumer and should be eliminated.

V. ETFS ARE “OTHER TERMS AND CONDITIONS” WITHIN THE MEANING OF § 332(c)(3)

A. The Legislative History of § 332(c)(3) and On Point Authority From California Regulators Indicates That ETFs Are “Terms and Conditions”

The legislative history of § 332(c)(3)—which commits service and equipment bundling issues to state jurisdiction—combined with the Commission’s prior order permitting the bundling of wireless equipment and service, and the carriers’ insistence that ETFs are necessary to recover the cost of handsets, all indicate that Congress intended states to have jurisdiction over ETFs.

Specifically, as pointed out by NASUCA,⁵¹ in 1992, the Commission promulgated an order permitting the bundling of wireless services with CPE (*i.e.*, handsets)

⁵⁰ Verizon Reply at 4.

⁵¹ NASCUA Comments at 12-13; NASCUA Reply Comments at 16-17.

pursuant to term agreements, which generally included ETFs.⁵² Congress was presumably aware of this Order—and the link between term contracts, wireless CPE, and ETFs—when it drafted the legislative history of § 332(c)(3) one year later, and committed equipment bundling to state jurisdiction: “By ‘terms and conditions,’ the Committee intends to include such matters as ... the bundling of services and equipment”⁵³ Moreover, even if Congress were unaware of the *Cellular Bundling Order*, the carriers’ comments generally allege that ETFs are necessary to subsidize handset costs, and, as such are terms and conditions. For example, Sprint Nextel represents that handset bundling is one of the reasons that CMRS providers use ETFs in their customer agreements.⁵⁴ ETFs are therefore related to the “bundling of services and equipment,” that explicitly falls within the category of state-regulated terms and conditions under § 332(c)(3).

The legislative history further indicates that Congress did not intend to preempt state regulation of ETFs, which are unlawful liquidated damages provisions (as admitted by the carriers),⁵⁵ not “rates charged.” As noted by the court in *Union Ink Co. v. AT&T*,⁵⁶ “[t]hose rules of law that, generally, govern the relationships between parties to consumer transactions are singled out for particular preservation.” Moreover, the carriers’ interpretation of § 332(c)(3) is

⁵² *Bundling of Cellular CPE and Cellular Service*, 7 FCC Rcd 4028, ¶12 (1992) (“*Cellular Bundling Order*”).

⁵³ H.R. Rep. No. 103-111, at 261 (1993).

⁵⁴ Sprint Nextel Reply at 5-12.

⁵⁵ See WCA Reply at 9 (citing Nextel, AT&T Wireless, T-Mobile contracts describing ETFs as liquidated damages provisions).

⁵⁶ 801 A.2d 361, 374-75 (N.J. Super. App. Div. 2002).

unfairly asymmetric. While carriers seek to rely on state contract law to recover liquidated damages, they argue that customers cannot assert state contract defenses (*i.e.*, that ETFs represent unlawful penalties) and consumer protection law defenses to these collection actions.⁵⁷

There is also on point authority from the California Public Utilities Commission (“CPUC”), which specifically held that ETFs are subject to state jurisdiction.⁵⁸ In particular, the CPUC fined Cingular \$12,140,000 because Cingular “charg[ed its] customers Early Termination Fees ... without permitting a grace period to determine whether Cingular’s service met the customer’s needs, particularly during a period of time when Cingular conceded it experienced significant network capacity problems, and yet failed to disclose those capacity problems to potential customers.”⁵⁹ The CPUC rejected Cingular’s contention that such state regulation of ETF provisions was preempted under § 332(c)(3), stating that its Order “raises the kind of consumer protection matters that federal law permits the states to adjudicate [and does not] expressly or impliedly seek[] to regulate wireless rates or terms of entry.”⁶⁰

B. Because They Are Liquidated Damages Provisions or Unenforceable Penalties, ETFs Are “Terms and Conditions”

The CMRS providers alternatively contend that ETFs are liquidated damages provisions. As such, ETFs are contractual “terms and conditions”

⁵⁷ WCA Comments at 16.

⁵⁸ WCA Comments at 21.

⁵⁹ *Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless*, Investigation No. 02-06-003, 2004 Cal. PUC LEXIS 577 at *1 (December 16, 2004).

⁶⁰ *Id.*, at *4.

rather than rates. Specifically, in their customer contracts, Nextel, AT&T Wireless, and T-Mobile all describe the ETF as an agreed upon amount for liquidated damages.⁶¹ While the wireless industry seeks a Commission ruling that ETFs are *per se* enforceable and immune from state jurisdiction, the consumer commenters do not ask that ETFs be declared *per se* unenforceable. Rather, the consumer commenters simply ask that the Commission permit state court rulings as to whether the ETFs charged by carriers violate state laws against unenforceable penalties. If these ETFs do in fact comply with state law, the *status quo* will not change.⁶²

C. The Wireless Industry Misrepresents the Holding In *Cedar Rapids Cellular*

Finally, the holding of *Cedar Rapids Cellular Telephone, L.P. v. Miller*⁶³—that ETFs are “terms and conditions” within the meaning of § 332(c)(3)—was not, as alleged by Cingular, “reversed” by the Eighth Circuit.⁶⁴ In *Cedar Rapids Cellular*, Iowa’s Attorney General brought an action in state court against a group of wireless providers alleging that the carriers’ ETFs violated Iowa’s consumer protection statutes. The wireless providers removed the case to federal court, where they sought: (1) a declaratory judgment that any state regulation of ETFs was preempted by § 332(c)(3); and (2) an injunction preventing the Attorney

⁶¹ See WCA Reply at 9 (citing Nextel, AT&T Wireless, T-Mobile contracts).

⁶² WCA Reply at 14.

⁶³ No. C00-58MJM, 2000 U.S. Dist. LEXIS 22624, *21-22 (N.D. Iowa Sept. 15, 2000).

⁶⁴ Cingular Reply at 20.

General from enforcing the state's consumer protection laws against them.⁶⁵

The district court held that § 332(c)(3) did not preempt state regulation of ETFs:

“[S]ection 332, does not so completely preempt regulation of wireless telephone service such that any claim sounding in state law is necessarily federal in character for purposes of federal question jurisdiction under the Declaratory Judgment Act.”⁶⁶ This holding is directly relevant to the case at bar, and was, quite properly, cited by all consumer commenters.

The Eighth Circuit did not disturb the holding regarding the limited preemptive reach of § 332(c)(3), but took issue with the district court's jurisdictional treatment of the carriers' claim for injunctive relief, stating that, “because the appellants are also seeking injunctive relief [in addition to a declaratory ruling] on their preemption claims, the district court has jurisdiction to hear them.”⁶⁷ The Eighth Circuit held that because the injunctive relief sought by the wireless carriers might provide an independent basis for federal jurisdiction (*i.e.*, an injunction against state enforcement actions would provide jurisdiction, unless barred by the Eleventh Amendment), Iowa's remand petition should not have been granted without consideration of these jurisdictional grounds.⁶⁸ Thus, the Eighth Circuit in no way cast doubt on the district court's substantive holding that § 332(c)(3) does not preempt state regulation of ETFs for purposes of a declaratory ruling.

⁶⁵ *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 876-78 (8th Cir. 2002).

⁶⁶ *Cedar Rapids Cellular*, 2000 U.S. Dist. LEXIS 22624 at *22.

⁶⁷ *Cedar Rapids Cellular*, 280 F.3d at 878 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 409-10 & 410 n.14 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986)).

⁶⁸ *Id.*

VI. STATE REGULATION OF ETFs IS NOT “CONFLICT PREEMPTED” AND WILL NOT “BALKANIZE” THE CMRS INDUSTRY BEYOND CONGRESSIONAL INTENT

The CMRS industry argues that despite § 332(c)(3)’s division of authority between the state and federal governments, state regulation of ETFs is “conflict preempted” because it “threatens to substantially impair the ‘uniform, national, and deregulatory’ wireless framework established by the FCC.”⁶⁹ Similarly, other wireless carriers claim that allowing states to regulate ETFs will “Balkanize” the CMRS industry,⁷⁰ discourage investment in the CMRS industry,⁷¹ and lead to the loss of national pricing plans.⁷²

A. State Regulation of ETFs Is Not “Conflict Preempted”

The carriers’ claims that state regulation of ETFs is “conflict preempted,” ironically, conflicts with the statutory language in § 332(c)(3) and our federalist system of government and must therefore be rejected. As stated by the Consumer Groups, “[o]ur federal system is based on the concept of dual sovereignty of federal and state governments ... The statutory language and the Congressional history of 47 U.S.C. 332(c)(3)(A) demonstrate ... Congress’ acknowledgment and expectation that the States will use their traditional police powers to protect wireless consumers in the marketplace.”⁷³ Further, “[g]iven the explicit statutory language regarding the areas in which state law is either

⁶⁹ Verizon Comments at 27. See also Cingular Comments at 16-20; Sprint Comments at 14-18; CTIA Reply at 31-32; Sprint Nextel Reply at 13-18.

⁷⁰ Nextel Comments at 14-15.

⁷¹ Dobson Comments at 4.

⁷² T-Mobile Comments at 11.

⁷³ Consumer Groups Comments at 3.

preempted or preserved is Section 332(c)(3)(A), the Commission may not broadly preempt state laws governing CMRS providers' ETFs on the grounds that such authority is implied from Congress' general objectives."⁷⁴

As pointed out by NASUCA,⁷⁵ the wireless industry ignores well-settled preemption law in arguing that the Commission is empowered to preempt state regulation of ETFs pursuant to § 332(c)(3). First, Congressional intent is the ultimate touchstone for determining whether federal law preempts state law. Second, the burden on the party claiming preemption is high. Third, any statutory ambiguities regarding preemption are resolved in favor of the states. Fourth, the presumption is against preemption. Fifth, where areas involving a state's traditional police powers are involved—including consumer protection and utility regulation—Congressional intent to preempt must be “clear and manifest.”

None of these conditions can be met here, where Congress expressly insulated state jurisdiction from federal preemption as to “terms and conditions” in the unambiguous language of § 332. While § 332(c)(3) might express a general policy in favor of a nationwide CMRS marketplace, the section specifically allocates jurisdiction over “terms and conditions” of wireless service agreements (including ETFs) to the states. Given the specificity with which Congress addressed “terms and conditions,” and the presumption against preemption, the Commission cannot find that state regulation of ETFs is

⁷⁴ NASUCA Reply at 20-21.

⁷⁵ NASUCA Reply at 2.

preempted because of a putative conflict with federal policy favoring a nationwide CMRS marketplace.⁷⁶

B. The Carriers Misapprehend The Doctrine of “Complete Preemption” In the Context of This Proceeding And Rely On Inapposite Preemption Cases

Cingular and SunCom also misstate the law of preemption by alleging that, “a judicial holding that the Communications Act does not ‘completely preempt’ state law for purposes of federal subject matter jurisdiction on removal does not insulate the state law from preemption as a substantive matter.”⁷⁷ Contrary to Cingular and SunCom’s allegations, complete preemption cases are instructive here.

Cingular and SunCom do correctly point out that “complete preemption” is distinguishable from “ordinary preemption.” “Complete preemption” is a narrow exception to the well-pled complaint rule under which “a cause of action arises under federal law [for jurisdictional purposes] only when the plaintiff’s well-pleaded complaint raises issues of federal law.”⁷⁸ “Complete preemption” confers federal jurisdiction regardless of whether the well-pled complaint rule is satisfied but can be invoked only when Congress has “so completely pre-empt[ed] a particular area that any civil complaint raising this select group of

⁷⁶ See also Consumer Groups Comments at 4-6 (noting the presumption against preemption).

⁷⁷ Cingular Reply at 23 (citing *Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703, 709 (N.D. Tex. 2000)). See also SunCom Comments at 16-17 (arguing that complete preemption cases are inapplicable).

⁷⁸ *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

claims is necessarily federal in character.”⁷⁹ Thus, if the “complete preemption” doctrine applies to a claim, even if that claim is raised as an affirmative defense rather than as part of a complaint, the case can be removed to federal court.⁸⁰ “Ordinary preemption” on the other hand, is “a federal defense to the plaintiff’s suit,” but “does not authorize removal to federal court.”⁸¹

In the cases cited by SunCom and Cingular, the procedural distinction between complete preemption (the exception to the well-pleaded complaint rule) and ordinary preemption (limiting a defendant’s removal options) is irrelevant to the discussion of § 332(c)(3). AARP, however, invites attention to these cases because their teachings regarding the classification of ETFs as “rates,” which are subject to federal jurisdiction, versus “other terms and conditions,” which are subject to state jurisdiction, are instructive. The jurisprudence as to the proper jurisdictional classification of ETFs is relevant to the instant case regardless of whether a defendant has the right to remove a case to federal court based on the complete preemption doctrine.

The wireless industry’s analogies—such as those to the preemptive reach of federal regulations of airbags in automobiles—are also inapposite.⁸² In *Geier*, the case cited by Sprint Nextel, the legislation in question delegated broad authority to the Department of Transportation to promulgate rules concerning

⁷⁹ *Id.*, at 63-64.

⁸⁰ *Id.*, at 63.

⁸¹ *Id.*

⁸² Sprint Nextel Reply at 18 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)).

airbag use in automobiles but also contained a separate savings clause.⁸³ The DOT then issued rules pursuant to this statutory mandate that allowed automobile manufacturers to gradually implement airbag technology.⁸⁴ The Court held that despite the presence of a separate savings clause, states were not empowered to issue court decisions that mandated flash-cut implementation of air bag technology, thereby expressly conflicting with a properly promulgated federal rule.⁸⁵

This case presents a different situation. Rather than requiring a court to harmonize independent and apparently conflicting clauses—one that empowers federal action and another that expressly preserves state authority—the instant statute contains a single clause which expressly allocates jurisdiction between federal and state authorities. Section 332(c)(3) commits “terms and conditions” of contracts between CMRS providers and their customers solely to state discretion, and “rates” and “market entry” solely to federal discretion. Therefore, no conflict can arise between a properly promulgated federal rule or policy when a state regulates terms and conditions such as ETFs.

C. The Wireless Industry’s “Balkanization” Claims Are Legally And Factually Flawed

Finally, the carriers’ argument that the CMRS industry should not be “Balkanized” by state regulation is both legally and factually flawed. Legally, § 332(c)(3) does not support the wireless industry’s contention that Congress

⁸³ *Geier*, 529 U.S. at 867.

⁸⁴ *Id.* at 875.

⁸⁵ *Id.* at 881-882.

intended to create a CMRS market in which CMRS providers—unique among the nation’s industries—are exempt from any state contract or consumer protection law. Moreover, contrary to the claims of the wireless industry, empirical evidence indicates that state-by-state regulation of ETFs (*i.e.*, a “Balkanized” regulatory regime) has had no “Balkanizing” effect on the price of handsets or service. For example, as noted by Carver Ranches National Park, Inc.:⁸⁶

- Cingular offers the same activation fees, national rate plans, handset pricing, and contract terms in California (with flat ETFs) as it does in Florida and 10 other states (with prorated ETFs);
- The modifications to Sprint’s, Cingular’s, and Verizon’s ETFs required by the 32-state Assurance of Voluntary Compliance (“AVC”) settlement had no effect on any of those carriers’ national rate plans, handset pricing, activation fees or contract terms;
- Sprint, Cingular, and Verizon offered the same national rate plans, handset pricing, activation fees and contract terms before the AVC as they offered after the AVC; and
- Sprint, Cingular, and Verizon currently offer the same national rate plans, handset pricing, activation fees and contract terms in the 32 states covered by the AVC as they offer in the 18 states that are not covered by the AVC.

Against this background, the carriers’ “Balkanization” claims are both legally and factually flawed. They should be rejected by the Commission.

VII. CONSUMERS ARE DISSATISFIED WITH ETFS AND DO NOT VIEW THEM AS RATES

The record clearly demonstrates a profound dissatisfaction with ETFs on behalf of the nation’s consumers. Specifically, “The fact that all of the nation’s top consumer organizations, as well as organizations representing only cell

⁸⁶ Carver Ranches National Park, Inc. Reply at 3-4.

phone customers, are aligned in opposition to these petitions should make it clear where consumers stand.”⁸⁷ Moreover, there is no record evidence—other than Cingular’s naked allegation—that attorneys’ fees are the motivating factor behind the consumer commenters’ interpretation of § 332(c)(3) to preserve the viability of state consumer protection and contract law in the wireless market.⁸⁸ It is telling, however, that not a single non-carrier supports the wireless industry’s self-serving attempt to avoid the reach of the nation’s consumer protection laws.

A. The FCC’s Data and Press Reports Reflect Consumer Dissatisfaction With ETFs

The FCC Quarterly Reports on Informal Consumer Inquiries and Complaints confirm that complaints regarding ETFs increased in the last quarter, from 670 in 4Q04, to 1,118 in 1Q05, 1,064 in 2Q05, and 1,075 in 3Q05.⁸⁹ In addition, more than 20,000 consumers have filed comments in this proceeding urging the Commission not to preempt state jurisdiction over ETFs.⁹⁰ This expression of consumer dissatisfaction conclusively refutes Sprint’s remarkable contention that “[a] complaint rate at this level does not support the claim that customers view ETF as serious concern or unreasonable practice [sic].”⁹¹

In addition, as **Consumer Reports**, observed only days ago, “[s]ubscribers remain dissatisfied with their cell phone service and former customers of AT&T Wireless have fared particularly poorly since that company

⁸⁷ Consumer Groups Reply at 3-4.

⁸⁸ Cingular Reply at 29.

⁸⁹ <http://ftp.fcc.gov/cgb/quarter/>.

⁹⁰ NASUCA Comments at 29.

⁹¹ Sprint Comments at 4-5.

was acquired by Cingular.”⁹² Part of this dissatisfaction stems from the fact that ETFs can coerce customers into staying with a carrier with substandard service: “[M]any former AT&T Wireless customers complained they were forced to make a difficult choice. They could tolerate bad service, pay extra and lock into a long-term contract by switching to a Cingular phone **or pay early-termination fees to leave the carrier.**”⁹³

B. A U.S. PIRG Report Confirms Consumer Distrust of ETFs

A U.S. PIRG Report submitted as an *ex parte* filing in this docket also reflects consumers’ unhappiness with ETFs.⁹⁴ The report confirms that ETFs discourage wireless customers from changing carriers, even in the face of dissatisfaction with rates, grade of service, and customer service. Customers suffer through disturbingly low quality wireless service in order to avoid the imposition of an ETF.⁹⁵ Statistically, 36 percent of wireless customers said ETFs had prevented them from changing carriers and 47 percent of wireless customers would consider switching wireless providers if ETFs were eliminated.⁹⁶ The Commission’s Tenth Annual Report on CMRS Competition confirms that wireless number “porting has not caused churn to significantly increase.”⁹⁷ The sticky

⁹² “AT&T Wireless Customers Got Short End Of Stick: Report,” *mobilepipeline* (Dec. 29, 2005) (<http://www.mobilepipeline.com/showArticle.jhtml?articleID=175701006>).

⁹³ *Id.*, (emphasis added).

⁹⁴ Edmund Mierzwinski, “Locked In A Cell: How Cell Phone Early Termination Fees Hurt Consumers,” U.S. PIRG Education Fund (August 2005) (<http://uspirg.org/uspirg.asp?id2=18537>). See also NASUCA Reply at 25-27 (commenting on PIRG Report).

⁹⁵ *Locked in a Cell*. at 7, 10.

⁹⁶ *Id.* at 14, 15.

⁹⁷ *Annual Report and Analysis of Competitive Market Conditions With Respect to CMRS* (Tenth Report), ¶ 152, WT Docket 05-71 (Sept. 30, 2005).

demand artificially created by ETFs blunts the impact of competitive entry which would otherwise incent carriers to increase their market share by offering higher quality and lower-priced goods and services.

Second, ETFs are a deadweight loss on the American economy. In particular, PIRG estimates that ETFs cost consumers \$4.6 billion from 2002 to 2004. This total includes \$2.5 billion in actual payments of ETFs by customer who did switch carriers, \$1.2 billion in benefits lost by customers who could not afford to switch carriers, and \$929 million in benefits lost by customers who felt the benefits of switching carriers were not enough to offset the cost of their ETFs.⁹⁸

Third, 89 percent of wireless customers surveyed did not view ETFs as “just another rate charged for the use of your cell phones similar to the monthly rates that you pay for your calling plan.” Rather, the vast majority of customers viewed ETFs as “penalties designed to discourage [customers from} switching” carriers.⁹⁹ Against this background, the Commission should be skeptical of claims by the wireless industry that consumers “prefer” service plans that contain ETFs.¹⁰⁰

⁹⁸ *Locked in a Cell* at 18-21.

⁹⁹ *Id.* at 16.

¹⁰⁰ See WCA Reply at 24-26 (All CMRS contracts, including those with ETFs, are contracts of adhesion whose terms are dictated by the CMRS industry. It is therefore absurd to argue that customers “demand” longer term deals with lower rates and ETFs. Rather, this is the manner in which the carriers have structured their lower per minute rate service offerings in order to lock customers into long contracts.)

VIII. CONCLUSION

The record in this proceeding indicates that the Commission should declare ETFs to be “terms and conditions” within the meaning of § 332(c)(3) and subject to state jurisdiction. Alternatively, because it is premised on a disputed factual record, the Commission should dismiss the CTIA Petition as procedurally defective.

Respectfully submitted,

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